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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. XAVIER ROBERTO ARVIZU, Appellant.	2 CA-CR 2009-0095 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071127

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

¶1 Xavier Roberto Arvizu appeals from his conviction and sentence for continuous sexual abuse of a child. He argues the trial court erred by precluding

evidence of the prior acts of two witnesses and the prosecutor committed misconduct during closing argument. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Arvizu's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In January 2007, eight-year-old P. and her sister, ten-year-old M., reported that Arvizu, their cousin, had been sexually abusing them. A grand jury charged Arvizu with one count of continuous sexual abuse of P., one count of molestation of M., and three counts of sexual conduct with M. After a five-day trial, the jury acquitted him of the charges involving M. and was unable to reach a verdict on the charge of continuous sexual abuse of P. The trial court declared a mistrial on that charge. After a second five-day trial, the jury found Arvizu guilty of continuous sexual abuse of P. The court sentenced him to a mitigated, thirteen-year prison term. This appeal followed.

Discussion

Preclusion of Prior-Act Evidence

¶3 Arvizu contends the trial court erred in precluding evidence he alleges illustrated specific instances of M.'s and P.'s dishonest conduct. "The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of discretion." *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). All relevant evidence—evidence having any tendency to make a fact in issue more or less probable—is admissible unless

excluded. Ariz. R. Evid. 401, 402. For the purpose of attacking or supporting a witness's credibility, specific instances of the witness's conduct, if probative of truthfulness or untruthfulness, may be explored during cross-examination "in the discretion of the court." Ariz. R. Evid. 608(b). A court has discretion to exclude otherwise admissible evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403.

¶4 Before Arvizu's first trial, the trial court precluded him from introducing evidence of specific instances of M.'s or P.'s ostensibly dishonest conduct.[1] The court reaffirmed its ruling before Arvizu's second trial. Although the court's ruling precluded the introduction of numerous items of evidence, Arvizu specifically argues the court abused its discretion by precluding evidence that (1) M. had threatened to tell lies about one of her friends if the friend did not complete M.'s homework; (2) M. had alleged that one of her middle-school teachers had touched her inappropriately; and (3) M. and P. had been punished for shoplifting candy shortly before they accused Arvizu of abuse.[2]

[1]The court noted, however, that Arvizu was entitled to present reputation or opinion testimony. *See* Ariz. R. Evid. 608(a).

[2]Arvizu notes in the fact section of his opening brief that the trial court also excluded evidence that M. had taught P. and another child to kiss "in a sexually suggestive manner" and that M. had accused her brother of molesting her. He does not argue, however, that the preclusion of this evidence was improper. We therefore do not address this issue.

¶5 At the hearing on the state's motion in limine before Arvizu's first trial, Arvizu's counsel described an incident in which M. had threatened to tell lies about her friend unless the friend completed M.'s homework, then denied and eventually admitted having done so after she was caught. He argued this evidence illustrated, among other things, a specific instance of M.'s dishonest conduct, thereby rendering it admissible. *See* Ariz. R. Evid. 608(b). The court disagreed, reasoning the evidence was "of marginal relevance, probably collateral, and probably not helpful." It concluded the probative value was outweighed by unfair prejudice and thus precluded the evidence.

¶6 Arvizu's counsel also described an incident in which M. had recanted an allegation of sexual misconduct against her teacher. M. had told her foster mother that her teacher "had bumped . . . his crotch into her butt" while she was standing in the lunch line between two of her friends. The foster mother reported the allegation to M.'s principal. The principal questioned M.'s friends, who denied seeing anything, and questioned the teacher, who denied any inappropriate contact. The principal then questioned M., who recanted her allegation. When asked about her recantation, M. told her foster mother either that "she didn't think [the teacher would] get in trouble for what she said" or that "she didn't think it would all get this blown out of proportion." When the state interviewed M., she maintained that "the touching happened and that her teacher bumped into her but it was an accident." Reasoning that this evidence involved "quite a lengthy discussion with foster parents, [the] schoolteacher, school principal [and] schoolmates about what did and did not happen," the court decided that admitting the evidence would lead to confusion and a waste of time. The court thus concluded the

probative value of the evidence was not sufficient to override "very strong" Rule 403 concerns and precluded its admission.[3] Arvizu concedes presenting this evidence "would have taken some time at trial."

¶7 Arvizu suggests the evidence of both P.'s and M.'s conduct was "highly probative," "[a]s demonstrated by the fact that the state relied on the absence of the evidence in its closing argument." In Arvizu's second trial, however, only P. was a named victim. Although some of M.'s testimony had corroborated P.'s, M. was not the victim of the alleged crime. Her credibility was, therefore, mostly collateral. Moreover, her testimony was, at times, markedly inconsistent with P.'s. For example, M. testified that she and P. slept in the living room of the residence where the alleged abuse occurred and that she saw Arvizu abusing P. in his mother's bedroom. She stated Arvizu had not taken P. into his room. P., in contrast, testified that she and M. slept in one of the bedrooms and that Arvizu had abused her in his room. Because M.'s testimony undermined P.'s, at least in part, evidence of specific instances of M.'s dishonest conduct

[3]The hearing occurred before the first trial, at which M. was a named victim. Arvizu had thus argued that evidence of M.'s allegation and recantation was admissible under Arizona's rape shield statute, A.R.S. § 13-1421. That statute in part provides that specific instances of a victim's prior sexual conduct are inadmissible, unless they involve evidence of false allegations of sexual misconduct made by the victim against others, the judge finds the evidence is relevant and material, and the inflammatory or prejudicial nature of the evidence does not outweigh its probative value. § 13-1421(A)(5); *see also* Ariz. R. Evid. 403; *State v. Gilfillan*, 196 Ariz. 396, ¶ 27, 998 P.2d 1069, 1077 (App. 2000) ("Both Subsections A and B of A.R.S. § 13-1421 supplement the evidentiary rules."). At the second trial, M. was not a named victim, and thus the provisions of § 13-1421 were then inapplicable; instead, Rule 608 governed admissibility of the evidence. But, because the court had concluded the evidence was inadmissible based on Rule 403 grounds, it was not error for the court to affirm its ruling precluding the evidence before the second trial.

would not have substantially assisted Arvizu—further illustrating the mostly collateral and confusing nature of the precluded evidence.

¶8 With regard to M.'s accusation against her teacher, the likelihood of confusion persisted because, as Arvizu appropriately concedes, presenting this evidence "would have taken some time at trial." In addition, it was not clear whether M. actually had been dishonest or whether the allegation was a result of miscommunication and confusion among the parties. Thus, the probative value of this evidence was minimal, and the risk of confusion substantial.

¶9 Arvizu ignores these considerations in suggesting the prosecutor's statement during closing argument that "there is no evidence" that "the kids were untruthful," indicated the evidence's probative value. Similarly, Arvizu's contention that questioning M. about specific instances of dishonesty "would have provided the jury with better evidence of [her] character than the fact that family members thought [she was] not honest" ignores the fact that M.'s credibility was mostly collateral to the second trial. Accordingly, the trial court did not abuse its discretion in precluding evidence that (1) M. had threatened to tell lies about her friend if the friend did not complete M.'s homework and (2) M. had alleged one of her middle-school teachers had touched her inappropriately.

¶10 Arvizu also sought to introduce evidence that M. and P. had been punished by V., a nonrelative with whom they were living at the time, for shoplifting candy minutes before they accused Arvizu of abuse. Arvizu made an offer of proof at the first trial, in which V. testified that M. and P. had admitted shoplifting candy. V. had

punished them for doing so and stated she had not believed their explanation of why they had shoplifted. Arvizu argued that, because V. had not believed M.'s and P.'s explanation for shoplifting the candy, M. and P. were motivated to fabricate the allegations of abuse they made minutes later. Finding the evidence did not suggest the children were motivated by a desire to deflect attention and blame, the trial court concluded that "[a]ny probative value of th[e] evidence about the candy is outweighed by the potential for prejudice and confusion of issues." The court precluded the evidence and reaffirmed its ruling during the second trial.

¶11 Although Arvizu asserts that, in stealing candy, "[M.] and [P.] committed an act involving untruthfulness," the testimony was clear that neither M. nor P. lied about having shoplifted. If anything, the testimony indicated equally M.'s and P.'s character for truthfulness and for untruthfulness. The evidence was not, therefore, highly probative of M.'s or P.'s lack of credibility, as Arvizu suggests. And, as noted above, M.'s credibility was mostly collateral to the issues in his second trial. Notably, the offer of proof on this evidence—nine pages' worth of testimony—occupied a significant amount of time. Thus, in light of the minimal probative value of the evidence, the potential for confusion of the issues was high. Accordingly, we conclude the trial court did not abuse its discretion in precluding evidence that M. and P. had been punished for shoplifting candy shortly before accusing Arvizu of abuse.

¶12 To the extent Arvizu argues the trial court's order precluding the evidence deprived him of his constitutional right to present his defense, we emphasize that "well-established rules of evidence permit trial judges to exclude evidence if its probative value

is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). We thus find no abuse of discretion or violation of Arvizu's constitutional rights.

Prosecutorial Misconduct

¶13 Arvizu asserts the prosecutor committed misconduct during closing argument by "arguing from evidence excluded on the state's own motion" and by engaging in improper vouching. Arvizu acknowledges he did not move for a mistrial, although the trial court sustained his objections to two of the prosecutor's purportedly improper statements. When a defendant accepts the remedial action a trial court employs, he waives any additional or greater remedy that he does not expressly request. *See State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006). Absent fundamental error, a defendant cannot complain the court failed to order a mistrial sua sponte. *Id.*; *see also State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006) ("[T]he trial court is in the best position to determine the effect of a prosecutor's comments on a jury."); *State v. Laird*, 186 Ariz. 203, 207, 920 P.2d 769, 773 (1996) ("If a party wants a mistrial, it ordinarily must ask for one."). Arvizu therefore has forfeited appellate relief unless he demonstrates fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶14 A prosecutor commits misconduct by "'call[ing] to the attention of the jurors matters that they would not be justified in considering in determining their verdict.'" *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000), *quoting State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988). To warrant reversal, the

defendant must demonstrate the improper statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see* U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 4. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . . .'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984).

¶15 Arvizu asserts the prosecutor committed misconduct when she "argued to the jury there was no evidence the children were untruthful" despite having successfully persuaded the trial court to preclude evidence to the contrary. The prosecutor stated:

> [P.'s and M.'s aunt] said to you that the kids were untruthful, but there is no evidence of that. We asked her about specific acts that the kids had done that were not true, it was exactly in accord with anything and everything else that other normal little kids do. Break a lamp, say somebody else did it. These are not kids, based upon the evidence and based upon the testimony, that are saying hurtful stories to get people in trouble, what they are doing is asking for help.

The prosecutor additionally stated in rebuttal:

> That's what kids make up. Kids make up things that are commensurate with their age, their maturity, their experience. Children don't make up being sodomized. Children don't make up having someone perform fellatio. Children are not sophisticated in the ways of the world like we adults are.

Arvizu suggests the precluded evidence we discussed above—as well as other precluded evidence suggesting M. possessed sexual knowledge[4]—contradicts these statements.

¶16 Arvizu argues the prosecutor unfairly "used the exclusion [of evidence] against [him]." But he cites no authority suggesting a prosecutor must limit his or her closing argument because of precluded evidence, even if precluded on the state's motion. We do, however, find a line of cases from Massachusetts holding a prosecutor may not "improperly exploit[] the absence of evidence that had been excluded at [the state's] request." *Commonwealth v. Carroll*, 789 N.E.2d 1062, 1069 (Mass. 2003).[5] First, we question whether a prosecutor commits misconduct by arguing inferences that fairly may be drawn from the evidence presented, notwithstanding the existence of excluded evidence. Such conduct cannot be said to have misled the jury or called to its attention matters it could not properly consider.[6] *See Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d at 360.

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[4]As we previously noted, the trial court also precluded evidence M. had been seen teaching a younger girl how to kiss in a sexually suggestive manner and evidence she had previously accused her brother of molesting her.

[5]*See also Commonwealth v. Harris*, 825 N.E.2d 58, 71-72 (Mass. 2005) (prosecutor improperly argued no evidence supported inference witness was prostitute despite successfully having precluded evidence establishing that fact); *Commonwealth v. Haraldstad*, 453 N.E.2d 472, 473-74 (Mass. App. Ct. 1983) (prosecutor improperly emphasized doctor had declined to give opinion as to presence of sperm after successfully preventing defendant from clarifying doctor's testimony referred only to motile sperm); *Commonwealth v. Mosby*, 413 N.E.2d 754, 760 (Mass. App. Ct. 1980) (prosecutor improperly argued defendant "stood silent" in face of accusation after precluding evidence of defendant's reaction).

[6]We observe, however, that when a party makes statements in summation that arguably are contradicted by improperly excluded evidence, that fact is relevant to whether the opposing party was prejudiced by exclusion of the evidence. *Cf. State v. Taylor*, 196 Ariz. 584, ¶ 15, 2 P.3d 674, 679 (App. 1999) (prejudice from erroneously admitted evidence exacerbated by state's closing argument); *United States v. Irvin*, 87

¶17 Moreover, we find these cases distinguishable. In each, the prosecutor made statements in summation that plainly would have been false had the excluded evidence been admitted. For example, in *Carroll*, the prosecutor suggested the defendant's testimony that a co-perpetrator solely was responsible for an assault was incredible because the only motive apparent from the evidence was the victim's theft of the defendant's money. 789 N.E.2d at 1069. But the prosecutor had moved successfully to preclude evidence of the co-perpetrator's independent motive to attack the victim. *Id.* at 1066. Thus, the prosecutor's statement was knowingly false. Here, in contrast, none of the precluded evidence, if admitted, would have rendered the prosecutor's statements indisputably false.

¶18 "The function of closing arguments is to enable each party to review the evidence and tie it to the applicable law in a light that favors its legal position at the trial." *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 48, 945 P.2d 317, 359 (App. 1996). The prosecutor is entitled to identify and argue inferences supported by the evidence presented at trial. *See State v. Marvin*, 124 Ariz. 555, 557, 606 P.2d 406, 408 (1980). Those inferences are not rendered somehow unfair by the proper preclusion of evidence that may have suggested contrary conclusions.

¶19 Arvizu also asserts the prosecutor engaged in improper vouching. Improper vouching occurs when a prosecutor "places the prestige of the government

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F.3d 860, 866 (7th Cir. 1996) (improper admission of defendant's gang affiliation prejudicial error when emphasized in state's closing argument). Additionally, in certain circumstances, similar statements in summation could weaken an argument that the precluded evidence lacked relevance.

behind its witness" or "suggests that information not presented to the jury supports the witness's testimony." *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989); *see also State v. Palmer*, 219 Ariz. 451, ¶ 6, 199 P.3d 706, 708 (App. 2008).

¶20 Arvizu first contends the prosecutor placed the prestige of the state behind the child witnesses by stating, "[W]hat they told you when they came in here and they testified . . . is the truth." We agree that, read in isolation, this statement was improper, and the trial court correctly sustained Arvizu's immediate objection to it. *See United States v. Martin*, 815 F.2d 818, 822 (1st Cir. 1987) (disapproving statement that witnesses "told [the jury] the truth"). But the prosecutor then promptly emphasized to the jurors that it was their obligation to determine the witnesses' veracity and that she was not vouching for their credibility:

> The decision about whether or not the children are telling the truth is yours, absolutely, and we talked about this from the very beginning, that is your determination to make. And what I am doing is just articulating to you the reasons why defense counsel's argument about their motive to tell a lie doesn't make any sense, but make no mistake about it, that determination is yours.

Viewing the prosecutor's statements in context, no reasonable juror would interpret them as placing the prestige of the state behind the children's testimony. Accordingly, no improper vouching occurred.

¶21 Arvizu next asserts the prosecutor improperly suggested that unadmitted evidence supported the witnesses' testimony by stating:

> [W]hen all the kids testified, we talked about those transcripts previously, the interviews, the transcripts, everything they had said before[,] written down. Ladies and gentlemen, if

> they had said something different than they did on the stand, you would have heard about it, you would have heard about it. Because what they have said is written down in those transcripts.

A prosecutor is not permitted to suggest matters not in evidence support a witness's testimony. *Vincent*, 159 Ariz. at 423, 768 P.2d at 155. Although the transcripts, both from interviews and the previous trial, were not admitted into evidence, parts of the transcripts were nonetheless presented to the jury through both parties' examination of witnesses. Thus, we question whether the prosecutor's statement constituted improper vouching. In any event, because the contents of the transcripts were presented to the jury, at least in part, we find no reasonable probability the prosecutor's statement "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191, *quoting Donnelly*, 416 U.S. at 643.

¶22 Even assuming, without deciding, that the prosecutor's argument was improper, Arvizu has failed to demonstrate fundamental, prejudicial error. The trial court correctly instructed the jury that the attorneys' arguments were not evidence. Arizona courts have repeatedly held that improper vouching falls short of fundamental, prejudicial error when the trial court gives such an instruction. *See State v. Lamar*, 205 Ariz. 431, 441-42, 72 P.3d 831, 841-42 (2003) ("Given both the limited context of the prosecutor's remarks and the court's instruction, we conclude the prosecutor's comment does not constitute fundamental error."); *State v. Taylor*, 109 Ariz. 267, 274, 508 P.2d 731, 738 (1973) (instruction that counsel's argument was not evidence corrected any prejudice from prosecutorial vouching); *State v. Dillon*, 26 Ariz. App. 220, 223, 547 P.2d 491, 494

(1976) (no prejudice from improper vouching because jury instructed closing argument not evidence). Thus, for the reasons stated, to the extent the prosecutor's comments were improper, they do not constitute reversible error.[7]

Disposition

¶23 We affirm Arvizu's conviction and sentence for continuous sexual abuse of a child.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

[7]Arvizu also contends the prosecutor's comments, when viewed together, "constitute[d] misconduct . . . pervasive enough to justify reversal." *See State v. Bocharski*, 218 Ariz. 476, ¶ 74, 189 P.3d 403, 418-19 (2008) ("Even if the alleged acts of misconduct do not individually warrant reversal, we must determine whether the acts 'contribute to a finding of persistent and pervasive misconduct.'"), *quoting State v. Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d 368, 403 (2006). But, as we have explained, only one of the prosecutor's statements reasonably could be characterized as improper. Thus, there could be no cumulative misconduct.